

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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FRANK BUXTON III,

Petitioner,

v.

SHERRY GRABER,

Respondent.

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MEMORANDUM and ORDER  
06-C-739-S

On December 18, 2006 petitioner Frank Buxton III filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 claiming that his Outagamie County Wisconsin convictions were unconstitutional. On January 16, 2007 respondent filed a motion to dismiss the petition as untimely. Petitioner responded on January 23, 2007.

FACTS

The Outagamie County Circuit Court amended petitioner's judgments of conviction on December 12, 2002. The Court sentenced petitioner to a five-year prison term for possession of marijuana with intent to deliver and stayed a consecutive five year term of imprisonment with five years probation for the delivery of THC. Petitioner did not appeal from the amended judgments. He now claims that the amended judgments of conviction were unconstitutional.

Petitioner filed a motion for jail credit or sentence modification in Outagamie County Circuit Court on July 27, 2005.

On May 9, 2006 the Wisconsin Supreme Court denied his petition for review in the appeal of the denial of his request for a sentence modification.

Petitioner filed this petition for a writ of habeas corpus on December 18, 2006.

#### MEMORANDUM

Respondent moves to dismiss petitioner's petition for a writ of habeas corpus as untimely. Pursuant to 28 U.S.C. § 2244(d) a one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to judgment of a state court. The period commences from the date on which judgment becomes final on direct review or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

The statute further provides that the time during which a properly filed application for state post-conviction review concerning the pertinent judgment is pending shall not be counted toward this period of limitation. This statute took effect on April 24, 1996.

Petitioner discovered his claims that he raises in this petition on the date that the trial court amended his judgment of convictions, December 12, 2002. 28 U.S.C. §2244(d)(1)(D). Accordingly, the one year period in which petitioner could file a

petition for a writ of habeas corpus in this Court expired on December 12, 2003.

During this one year period petitioner did not have any pending properly filed state court postconviction motions. Petitioner's motion for jail credit or sentence modification was not filed until July 27, 2005 which was after the one year limitation period had expired. Accordingly, petitioner's petition for a writ of habeas corpus is untimely pursuant to 28 U.S.C. § 2241(d)(1) and must be dismissed.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed as untimely. See Newlin v. Helman, 123 F.2d 429, 433 (7<sup>th</sup> Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED with prejudice as untimely pursuant to 28 U.S.C. § 2244(d).

Entered this 14<sup>th</sup> day of February, 2007.

BY THE COURT:

s/

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JOHN C. SHABAZ  
District Judge